

Ottawa, Thursday, November 27, 1997

File No.: PR-97-023

IN THE MATTER OF a complaint filed by Trac Industries Ltd.
under subsection 30.11(1) of the *Canadian International Trade
Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into
the complaint under subsection 30.13(1) of the *Canadian
International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to hear
the complaint under the *Agreement on Internal Trade*. Consequently, the complaint is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: November 27, 1997

Tribunal Member: Robert C. Coates, Q.C.

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gerry Stobo

Complainant: Trac Industries Ltd.

Counsel for the Complainant: David W. Lech

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Michael Ciavaglia

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FINDING OF THE TRIBUNAL

INTRODUCTION

On September 19, 1997, Trac Industries Ltd. (Trac) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) of depot level inspection and repair services for armoured vehicles general purpose, Department of National Defence (DND) (Solicitation No. W8486-6-VGRA/A). In summary, Trac alleged that, in evaluating offers, the Department improperly applied certain evaluation criteria in the tender documents relating to the labour force qualification to perform certain welding operations and, thereby, erroneously declared Trac's proposal non-responsive.

On October 2, 1997, the Canadian International Trade Tribunal (the Tribunal) determined, on the basis of the existing record, that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into the complaint.

On October 30, 1997, the Department filed with the Tribunal a notice of motion to obtain, amongst other things, an order dismissing the complaint on the basis that the Tribunal is without jurisdiction in this matter, since the procurement is excluded from the applicable provisions of the *North American Free Trade Agreement*³ (NAFTA), the *Agreement on Government Procurement*⁴ (the AGP) and the *Agreement on Internal Trade*⁵ (the AIT). On November 7, 1997, Trac filed with the Tribunal comments on the Department's motion and, on November 13, 1997, the Department filed with the Tribunal its comments on Trac's comments. Trac filed its last comments with the Tribunal on November 14, 1997.

1. R.S.C. 1985, c. 47 (4th Supp.).

2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

4. As signed in Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

5. As signed at Ottawa, Ontario, on July 18, 1994.

The Department claimed that this procurement was excluded from the provisions of the AIT pursuant to Article 508(1), which reads, in part:

1. A Party may, under exceptional circumstances, exclude a procurement from the application of this Chapter for regional and economic development purposes, provided that:
 - (c) notice of all such excluded procurements is provided by one or more of the methods specified in Article 506(2) and the notice provides details of the exceptional circumstances; and
2. In the case of a dispute relating to a procurement excluded from the application of this Chapter under paragraph 1, factors such as the following are to be taken into account in the dispute resolution process.

The Department noted that Article 506(2) of the AIT provides, in part:

2. A call for tenders shall be made through one or more of the following methods:
 - (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers.

The Department states that proper identification of the exclusion was provided in the Notice of Proposed Procurement (NPP) posted on the Open Bidding Service⁶ (OBS) on February 5, 1997, as follows:

GSIN [goods and services identification number] N2510, DEPOT LEVEL INSPECTION AND REPAIR OF ARMoured VEHICLE GENERAL PURPOSE (AVGP), Quantity 263 each, Deliveries over the period from date of Contract to 31 March 2001.

...

Location. It is a condition of this Solicitation that eighty percent (80%) of the direct labour be performed in Chatham, New Brunswick, as part of an effort to bring long term economic benefit to that region.

This procurement is excluded from AIT under Article 508. The following Notice is provided in accordance with Article 508(1)(c):

The exceptional circumstances of the exclusion relate to the particular economic hardship facing the local economy. In this instance the hardship stems in part from the closure of the ... Canadian Forces Military Base at Chatham, New Brunswick, and the impact of that closure on the local economy.

Because the tender notice was given in accordance with the provisions of the AIT, this procurement, the Department contends, was properly excluded.

Trac admits that the procurement at issue is excluded from coverage under NAFTA and the AGP. It denies that the procurement was properly excluded from the provisions of the AIT. Trac submits that the Tribunal has jurisdiction to hear its complaint under the AIT because the Department's notice, as required under Article 508(1)(c) of the AIT, was not brought to bidders' attention and is inconsistent with the tender documents. Trac maintains that the Department did not give proper notification of the procurement's exclusion from the AIT. It states that no mention was made of the exclusion in the Request for Proposal (RFP) or in any discussion that it had with officials from the Department. Consequently, the Department's behaviour did not measure up to the requirements set out in Article 506(9) of the AIT, which provides that:

6. Electronic tendering system for Canada.

9. If a procurement exempted from the obligations of this Chapter under paragraph 11 or 12 or Article 507 or 508 is publicly tendered in a daily newspaper or on an electronic tendering system, the tender notice shall indicate the restrictions and highlight the practices that do not conform with this Article or Article 504.

Because the Department was not compliant with this provision, Trac submits that the Department could not rely upon the exclusion.

In the alternative, Trac states that the Tribunal's jurisdiction to hear a complaint concerning a procurement excluded under Article 508 of the AIT remains intact, except for the regional and economic development component of the procurement. Trac affirms that its complaint is unrelated to the regional and economic development component of the procurement and, therefore, that its complaint can be heard by the Tribunal. This position, Trac contends, is supported by the wording of Article 508(2) of the AIT, which provides for a continuing dispute resolution process concerning issues arising out of the application of the provisions of Article 508(1). In Trac's view, there is no difference between the bid protest procedures set out in Article 514 of the AIT and the dispute resolution process mentioned in Article 508(2) of the AIT.

In response, the Department submits that the NPP, or tender notice, complied fully with the requirements of Article 508(1)(c) of the AIT. The Department submits that Trac does not disagree with this assertion, but only objects to the fact that it was not expressly informed of the existence of the NPP or of all its contents in the tender documents. In this respect, the Department submits that Trac's failure to receive the notice that was given on the OBS cannot endow the Tribunal with jurisdiction in this case. As well, the Department submits that, contrary to the position taken by Trac, the tender documents are entirely consistent with the NPP. Indeed, Article 58 of the tender documents requires completion of Annex "D," whose wording tracks the wording in the NPP that 80 percent of the direct labour content of the proposal be based in the Chatham area. This wording, the Department submits, is entirely consistent with the basis upon which it exercised the authority found in Article 508(1) of the AIT.

Concerning Trac's submission that Article 508(2) of the AIT authorizes the Tribunal to conduct an inquiry into the AIT's compliance, apart from the Reciprocal Non-Discrimination rules in Article 504 of the AIT, the Department submits that this is an incorrect assumption. Article 508(2) of the AIT contemplates the resolution of disputes between parties (federal - provincial/territorial governments) within the meaning of Chapter Seventeen of the AIT, not the resolution of bid protests by the Tribunal. The Department concludes that, given that the provisions of Article 508(1) of the AIT have been invoked in this case, the Tribunal is without jurisdiction to review any part of the procurement process at issue under the AIT.

TRIBUNAL'S ANALYSIS

The parties agreed that the procurement at issue is excluded from the provisions of NAFTA and the AGP when procured for DND. The Tribunal must determine whether the Department gave notice as required by Articles 506(2) and 508(1) of the AIT.

The Tribunal observes, first, that the fact that exceptional circumstances exist in this instance is not a matter in dispute between the parties. Further, the Tribunal is satisfied that the NPP published on February 5, 1997, on the OBS satisfies the requirements of Article 508(1)(c) of the AIT. While clearly not a requirement, the Tribunal is of the view that the government should, whenever exclusions are going to be invoked under NAFTA, AGP or AIT procurement provisions, ensure that these exclusions are posted on all

documentation relative to the tender. This can be done with little effort and may ensure that potential suppliers, coming into the tendering process without seeing or being aware of the notice after it was issued, are fully aware of those exclusions. Nevertheless, the Department, in this case, gave notice as it was required to do.

Concerning the provisions of Article 508(2) of the AIT in respect of the resolution of disputes arising from the application of Article 508(1), the Tribunal determines that these provisions relate to the dispute resolution procedures in Chapter Seventeen of the AIT and not the bid protest procedures in Article 514 of the AIT. In the Tribunal's opinion, this distinction is made clearly in Article 1701(6) of the AIT which provides:

6. Articles 1702 through 1708 do not apply to bid protests initiated under Article 513 (Bid Protest Procedure - Provinces). Articles 1711 through 1720 do not apply to bid protests initiated under Article 514 (Bid Protest Procedure - Federal Government).

The administration of dispute resolution procedures is not within the Tribunal's jurisdiction. The Tribunal is limited to designated contracts as defined in subsection 3(1) of the Regulations which states, in part:

3.(1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described ... in Article 502 of the Agreement on Internal Trade ... by a government institution, is a designated contract.

In view of this, the Tribunal cannot adjudicate matters arising under Chapter Seventeen of the AIT.

TRIBUNAL'S DECISION

In light of the above, the Tribunal determines that the solicitation at issue has been properly exempted from the application of Chapter Five of the AIT. Accordingly, the contract is not a designated contract under the AIT within the meaning of section 30.1 of the CITT Act and, therefore, on that basis, the complaint is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member